IN THE HIGH COURT OF JUDICATURE OF BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 1406 OF 2005

Mrs.Sunanda Janardan Rangnekar .. Petitioner

versus

The Rahul Apartment No.11 Co-op

Housing Society Limited .. Respondents

...

Mr.V.R. Walavalkar with S.R. Bhalekar for the petitioner.

Mr.A.S. Desai for the respondent no.1.

Mr.Pradeep Jadhav AGP for the respondent nos.2 and 3.

CORAM : D.G. KARNIK,J.

DATED : 10th August 2005.

ORAL JUDGEMENT :-

1. By this petition, the petitioner challenges the judgement and order passed by the Divisional Joint Registrar, Bombay on 7th December 2004

dismissing the revision.

2. The respondent no.1 is a co-operative housing society (for short 'the society') having 29 members. There are 28 residential flats which are allotted to 28 members and one shop is allotted to the petitioner. The area of the flats varies between 479 sq.ft and 657 sq.ft. The area of the shop premises in occupation of the petitioner is about 160 sq.ft. i.e. to say that the petitioner's shop is smaller than the smallest flat in the building of the respondent no.1 society. It appears that the society recovers from the members property tax, payable to the municipal authorities at the rate of Rs.30.81 per sq.ft per annum of the area of the flat/shop. In addition thereto, the Society also levies and recovers from the members amount by way of society charges/maintenance at a flat rate of Rs.8,000/- per annum (Rs.2,000/- per quarter per flat). The society sought to recover from the petitioner society charges/maintenance at the rate of Rs.32,000/-per annum (Rs.8,000/- per quarter) for the shop occupied by him. According to the petitioner, this was illegal in as much as while only Rs.8,000/- per annum

were charged to the members occupying the residential flats Rs.32,000/- per annum were sought to be recovered from her by way of society charges/ maintenance which was highly discriminatory. As the petitioner's grievance was not addressed to she stopped making payment to the society. The society thereafter made an application for recovery of arrears of the dues with interest from the petitioner to the Asstt. Registrar of Co-operative Societies u/s.101 of the Maharashtra Co-operative Societies Act, 1961 (for short 'the Act'). The petitioner opposed the said application contending that the payment was withheld on account of excessive demand. She also contended that was liable to pay to interest. On 23rd December 2002, the Asstt. Registrar issued a certificate of recovery in favour of the respondent no.1 society in the amount claimed by it. Aggrieved petitioner challenged the recovery certificate by filing a revision before the Divisional Joint Registrar. By an order dated 7th December 2004, the Divisional Joint Registrar dismissed the revision application. That order is impugned in this petition.

3. Learned counsel for the petitioner submits

that while the society was issuing bills by way of society charges/maintenance charges at the rate of Rs.8,000/- p.a. (Rs.2,000/- per quarter) to each of the flat holder members, it was wrongly issuing the bills in the sum of Rs.32,000/- p.a. (Rs.8,000/- per quarter) to the petitioner in respect of the shop premises. She submits that no additional service whatsoever was provided by the respondent no.1 society to the petitioner or to the shop allotted to the petitioner nor was any additional amount spent for the maintenance of the shop and therefore the society was not entitled to treat the petitioner differently from other members. Learned counsel for the society submits that the sum of Rs.32,000/- per annum consisted of two parts viz. Rs.16,000/- for society charges/maintenance charges and a sum of a Rs.16,000/- as non occupation charges. As regards the charges for society charges/maintenance charges, he submits that a resolution has been passed by the general body of the society in its meeting dated 1st July 2001 authorising the society to levy society charges/maintenance charges in respect of the commercial premiss at twice the rate of charges for the residential premises and therefore the soceity was entitled to recover Rs.16,000/- per annum instead

of Rs.8,000/- p.a. in respect of shop premises occupied by the petitioner. As regards the non occupation charges of Rs.16,000/- the counsel submits that the petitioner was not personally occupying the shop but had let it out and therefore the society was entitled to non occupation charges under the bye laws of the society.

4. In view of the rival submissions of the parties, two points arise for my consideration.

i) Whether under the Act, Rules or bye-laws the society is entitled to recover society charges/maintenance for commercial premises at twice the rate charged for the residential premises?

ii) Whether the society is entitled in law to recover non occupation charges as claimed by it?

Regarding Point no.1.

5. Learned counsel for the petitioner submits that total number of members in the society are 29 out of which 28 persons occupy the residential premises and only the petitioner occupies one non

residential unit. Therefore the residential flat holders have a brute majority in the society and petitioner's lone voice is not heard. Taking advantage of the brut majority the flat holders want to subsidise the charges for the maintenance of their flats by recovering higher maintenance charges from her - the holder of a commercial premises. The society has no authority in law to treat the members differently and levy the charges for the commercial premises at a rate twice the rate of the residential premises. Though the area of the shop is much smaller than the area of the smallest residential flat, the petitioner never objected for paying the society charges/maintenance at the same rate as that of the residential flat holders. There should be equality in sharing of the burden of expenses for maintenance and common expenses which are recovered by the society as service charges or maintenance charges. They should be recovered equitably and equally from all the members. In support of these submissions learned counsel for the petitioner relies upon the decision of this Court in Venus Co-operative Housing Society Ltd. Vs. Dr.J.Y. Detwani reported in 2003 (3) All. M.R. 570.

6. In case of Venus Cooperative Housing Society the flats of different sizes, 284 small flats with two bedrooms and 39 large flats with four bedrooms. The society passed a resolution levying the different maintenance charges as per the area of the flats and issued a circular to that effect to members. Disputants who were the holders of the larger flats challenged the circular as also the resolution by filing a dispute u/s.91 of the Act before a co-operative court. The co-operative court declared the resolution of the society to be illegal and not binding on the disputants. The decision of the co-operative court was confirmed by the appellate tribunal. The order was impugned by the society by way of a Writ Petition. This Court held that the resolution of the society levying differential charges on the basis of the area of the flats was arbitrary, unreasonable, without any rational and without any source of power. It held that services of the society were enjoyed by all the members equally and there was no reason for the society to make the large flat holders pay more on the basis of the area of the flats. It held that though the supremacy of the general body cannot be doubted, even the supreme general body had to pass resolutions

considering all facts and circumstances of the matter. The general body cannot pass arbitrary and unreasonable resolutions merely because it is supreme and it has a large majority in favour of any issue on the agenda.

7. In the present case the society is recovering differential amounts by way of a property tax on the basis of the area of the flats at the rate of 30.81 per sq. ft. per annum of the area. That has rightly not been challenged by the petitioner, as the property tax payable to Municipal authority would obviously vary according to the area of a flat. However, so far as the charges for the society services or maintenance are concerned, no material was adduced before the Asstt. Registrar to show that any additional services were provided to the petitioner or any additional maintainence was incurred by the Society on account of petitioner being a holder of commercial premises. In the affidavit in reply filed in this Court also, it is not even be alleged that any additional services are provided to the petitioner by reason of her being the holder of commercial premises. In my view, the

society was not entitled to levy society charges/maintenance charges for commercial premises at twice the rate that of a residential premises. I am in respectful agreement with the view expressed by this Court in Venus Co-operative Housing Society Vs. Dr.J.Y. Detwani, (Supra) in this respect.

Regarding point no.2.

8. Learned counsel for the society submits that under bye-law no.45 of the bye-laws of the Society, a member is required to take previous permission of the managing committee before letting out and giving or giving on leave and licence basis or caretaker basis his premises or any part thereof. Clause (2) of bye-law no.45 provides that no member shall be permitted to sub-let or give on leave and licence based or caretaker basis any part of the premises unless he makes an application in the prescribed format and in the application gives an undertaking that he would pay non occupancy charges to the society at such rate as is decided in the meeting of the general body of the society. He therefore

submits that the Society was entitled to levy non occupancy charges of Rs.16,000/- per month as claimed by it.

9. Learned counsel for the petitioner submits that in the bills issued by the society, it has not claimed any non occupancy charges but had claimed the entire amount is claimed as society charges/maintenance charges and there is no basis for the contention that Rs.32,000/- were divided into two parts viz. Rs.16,000/- as society charges and Rs.16,000/- as non occupancy charges. He further challenges the validity of the bye-law and in any event submits that the charges were not claimed on the basis of this bye-law. He further submits that in any event as per the order dated 1st August 2001, issued by the Government by virtue the powers conferred on it u/s.79-A of the Act, the Government has directed that the non occupation charges cannot exceed 10% of the service charges. The learnedn counse, therefore, submits that the service charges could not be 100% of the society charges and would have to be restricted to 10% of the service charges/maintenance charges.

10. I have perused the copy of the application made by the respondent no.1 society to the Registrar for issuance of a certificate u/s.101 of the Act. In the said application, the society has not claimed non occupation charges at all but has claimed the amount under two heads i.e. society maintenance charges and service charges. Thus, the contention of the learned counsel for the petitioner that Rs.16,000/- per annum represent non occupation charges is not borne out from facts pleaded in the application. Assuming the bye law no.45 to be valid it says that the society is required to fix the non occupancy charges in the meeting of the general body. There is no pleading and there is no material on record to show that the general body meeting, the society had resolved to levy any non occupancy charges. The directions issued by the Government under section 79-A of the Act are binding on the society and their validity is not challenged before me. Under the said directions non occupation charges cannot be levied at a rate more than 10% of the service charges. In law, non occupation charges would mean charges for not personally occupying the premises i.e. either keeping the premises unused or locket or letting out or giving on license the premises. In view of the

Government order issued u/s.79-A of the Act the non-occupation cannot exceed 10% of the maintenance charges applicable to the concerned flat/unit. The society was therefore not entitled to recover the charges as claimed by it in the recovery certificate.

11. Neither of the authorities below appear to have applied their mind to these aspects. In the circumstances, their adjudication has to be set aside and is accordingly set aside and the matter is remanded back to the Asstt. Registrar for deciding it afresh in the light of the observations made by this Court.

12. Rule is made absolute to the extent mentioned above.

D.G.KARNIK, J